No. 87-1241

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA, Petitioner

vs.

UNION GAS COMPANY, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert A. Swift
(Counsel of Record)
KOHN, SAVETT, KLEIN & GRAF, P.C.
2400 One Reading Center
1101 Market Street
Philadelphia, PA 19107
(215) 238-1700

Lawrence Demase
ROSE, SCHMIDT, CHAPMAN,
DUFF & HASLEY
900 Oliver Building
Pittsburgh, PA 15222
(412) 434-8610

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8900

QUESTIONS PRESENTED

1. Whether the decision below correctly applies prior decisions of this court?

2. Whether Congress is empowered by the U.S. Constitution to abrogate state immunity in Article I enactments?

3. Whether retroactive liability under CERCLA presents an Eleventh Amendment issue?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were as follows:

Appellant: Union Gas Company
Appellee: Commonwealth of Pennsylvania

STATEMENT OF PARTIES AFFILIATED WITH RESPONDENT

The following are parent, subsidiary or affiliate companies of respondent Union Gas Company:

Penn Fuel System, Inc.
North Penn Gas Company
Penn Fuel Gas, Inc.
Gas Oil Products, Inc.
Gas Oil Products Inc. of Delaware
Allied Gas Company
Central Penn Gas Company
Counties Gas Company
Interborough Gas Company
Lewistown Gas Company
South Penn Gas Company

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS—*(Continued)*

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1241

COMMONWEALTH OF PENNSYLVANIA, Petitioner

vs.

UNION GAS COMPANY, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS

The Opinion of the United States Court of Appeals for which Pennsylvania seeks review is reported at 832 F.2d 1343 (1987) ("Union Gas II"). The Opinion of the Court of Appeals which was vacated by Order of this Court, 107 S.Ct. 865 (1987), is reported at 792 F.2d 372 (1986) ("Union Gas I"). The Opinion of the United States District Court for the Eastern District of Pennsylvania which originally dismissed the third party complaint against Pennsylvania is reported at 575 F.Supp. 949 (1983).

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Pennsylvania filed its Petition within 90 days of the entry of judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment XI:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

2. United States Code, 42 U.S.C. §§9601(21) and 9607(a), P.L. No. 96-510, 94 Stat. 2767 [Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980 ("CERCLA")]:

9601(21) "'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State or any interstate body;"

9607(a) ". . . any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . ."

3. United States Code, 42 U.S.C. §9601(20)(D) and 9620(a)(1), P.L. No. 99-499, 100 Stat. 1613 [Superfund Amendments and Reauthorization Act of 1986 ("SARA")]:

9601(20)(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply

to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.

9620(a)(1) In general.—Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act. Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107.

STATEMENT OF THE CASE

The sudden release of coal tar into Brodhead Creek in Stroudsburg, Pennsylvania in October 1980 caused the United States to declare the site the nation's first emergency Superfund site. Adjacent to the stream from 1890 to 1948 in an industrial section of Stroudsburg had been a carburetted water gas plant which produced coal gas as well as its by-product, coal tar. The EPA regarded in-ground disposal of coal tar as state of the art technology during the first part of this century (see EPA Amended Fund Authorization Report). The company operating the plant changed ownership several times before being merged into respondent in 1978. The plant was dismantled in 1948 and replaced successively by propane and natural gas distribution systems.

Between 1960 and 1962 the State rechanneled, narrowed and deepened Brodhead Creek and erected a dike on its sides.

The Borough of Stroudsburg and later the State obtained a permanent easement or fee title to much of the site. The rechannelization of this fast flowing stream started a process of downcutting of the stream bank and erosion of the toe of the dike that led to the release of coal tar. It was during repairs to the toe of the dike that coal tar was first discovered. Between April 1981 and January 1982, the United States did a cleanup of the site at an alleged expense of $967,000.00.

The United States commenced this lawsuit on May 23, 1983 in the United States District Court for the Eastern District of Pennsylvania to recover its cleanup costs pursuant to CERCLA and the Clean Water Act, 33 U.S.C. §§1321(b)(3) and (f)(2), naming respondent as the sole defendant. Respondent filed a third-party complaint naming the Commonwealth of Pennsylvania and the Borough of Stroudsburg as third party defendants alleging that they were owners and operators of a facility at the site within the meaning of CERCLA, 42 U.S.C. §9601(20)(A), and, together with others, negligently caused or contributed to the release of coal tar.

The State moved to dismiss the third-party complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) alleging that it was immune to suit under CERCLA pursuant to the Eleventh Amendment to the Constitution. The district court granted the State's motion (Pet. App., 139a). Thereafter, the United States filed an amended complaint revising its damage claim, and respondent filed an amended third-party complaint. The State again moved to dismiss, and the district court granted the motion for the reasons set forth in its earlier opinion.

As a result of a settlement reached among the United States, respondent and the Borough of Stroudsburg whereby respondent paid a major portion of the cost of cleanup, the district Court dismissed the action. Respondent then appealed the district court's dismissal of Pennsylvania as a defendant to the United States Court of Appeals for the Third Circuit. A two member majority of the Third Circuit affirmed the district court's order, with the Honorable A. Leon Higginbotham filing a vigorous dissent concluding that CERCLA clearly abrogated states' Eleventh Amendment immunity. (Pet. App. 74a)

On October 17, 1986, shortly after respondent filed a petition for certiorari with this Court, the President signed into law SARA, which amended CERCLA. At the urging of respondent herein and the United States, which as amicus contended SARA "authorizes suits against states or local governments for liability or contribution when such entries caused or contributed to the release or threatened release of a hazardous substance," (Amicus Br. at 5-6) this Court granted certiorari, vacated the court of appeals' opinion, and remanded for consideration in light of SARA.

On remand, the court of appeals unanimously reversed the district court holding that the Eleventh Amendment does not bar suit against Pennsylvania. (Pet. App. 1a) The court of appeals further held that (1) the language of CERCLA, as amended by SARA, clearly and explicitly abrogated state immunity, (2) Congress may, consistent with the Constitution, abrogate state immunity in an Article I enactment, and (3) CERCLA, as amended by SARA, applies retroactively to respondent's cause of action.

REASONS FOR DENYING THE WRIT

The issues raised by Pennsylvania are not appropriate for review because a unanimous Third Circuit Court of Appeals correctly resolved them, and its opinion is not in conflict with decisions of this or other courts.

I
THE DECISION BELOW CORRECTLY APPLIES PRIOR DECISIONS OF THIS COURT

The court of appeals correctly applied the clear statement rule which this Court has articulated in numerous decisions. The clear statement rule requires that Congress "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). See also *Welch v. State Department of Highways and Public Transportation*, 107 S.Ct. 2941 (1987); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Far from simply paying "lip-service" to this rule, the

court of appeals thoroughly and conscientiously applied it in interpreting CERCLA, as amended by SARA.

The court of appeals correctly concluded that states, like the federal government, are subject to liability to private parties under section 107(a) of CERCLA. In *Union Gas I*, Pet. App. 74a, the court of appeals acknowledged that Congress had made a "person" liable for environmental cleanup costs and "person" was defined to include a state, but held this language did not satisfy the clear statement rule. On remand from this Court, the court of appeals discerned Congress' unmistakable intent in SARA's Amendment to section 101(20)(D) of CERCLA, to wit:

> a state or local government shall be subject to the provisions of the Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.

This provision, the court of appeals observed, "replicates" CERCLA's waiver of federal government immunity. *Union Gas II*, Pet. App. 24a. Indeed, the Congressional conference committee that inserted the above quoted clause stated that its purpose was "*to clarify* that if the unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA both procedurally and substantively, as any non-governmental entity, including liability under section 107 and contribution under section 113." (emphasis added) H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 185-86, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3276, 3278-79.

SARA provides other evidence of Congress' unmistakable intent to abrogate Eleventh Amendment immunity in section 107 actions. First, SARA preserves states' immunity to suit from citizen suits filed pursuant to section 159. 42 U.S.C. §9659. The citizen suit provision makes "persons" subject to suit only "to the extent permitted by the Eleventh Amendment to the Constitution." This phrase was the same language used by Congress in prior environmental legislation to preserve states' Eleventh Amendment immunity. See, Clean Air Act, 42 U.S.C. 7401, 7604; Federal Water Pollution Control Act, 33 U.S.C. 1251, 1365, Resource Conservation and Recovery Act, 42 U.S.C. 3251, 6967. By contrast, there is no similar statutory limitation on section 107 actions under CERCLA.

Second, *Union Gas I*'s analysis relied heavily on the absence in CERCLA of an explicit waiver of state immunity similar to the federal waiver of immunity in section 107(g). 42 U.S.C. 9607(g).[1] In SARA, Congress not only replicated the federal waiver in section 101(20)(D), but it amended the federal waiver of immunity clause to provide that "nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107". 42 U.S.C. §9620(a)(1). Thus, Congress explicitly precluded the analysis used in *Union Gas I*.

Pennsylvania's interpretation of section 101(20)(D) enlisted no adherents on the court of appeals and lacks all credibility. If, as Pennsylvania contends, this provision was intended to insulate states from liability just to the federal government, it could have been worded to so provide. It was not. Rather, Congress made sure there was no such implication by expressly equating states' liability to that of nongovernmental entities.

The United States' own abandonment of sovereign immunity in a statute imposing strict liability is testament to the extent of the Congressional commitment that no one should be immune. By holding that states' immunity to suit under section 107 is abrogated, *Union Gas II* conscientiously applies the clear statement rule and closes the yawning gap in CERCLA's regulatory scheme that *Union Gas I* had left.

II
IT IS NOW WIDELY RECOGNIZED THAT CONGRESS IS EMPOWERED TO ABROGATE STATE IMMUNITY IN ARTICLE I ENACTMENTS[2]

---

1. Section 107(g) was recodified by SARA as section 120(a)(1) of CERCLA. Section 120(a)(1) is quoted in its entirety *supra*.

2. Should this Court grant certiorari, Union Gas will contend in its brief on the merits that *Hans v. Louisiana*, 134 U.S. 1 (1890), and its progeny should be overruled since the Eleventh Amendment only precludes federal courts from asserting jurisdiction in diversity of citizenship cases between a state and a citizen of a different state. *Atascadero State Hospital v. Scanlon*, 473 U.S. at 238 (1985) (J. Brennan, dissenting); *Welch v. State Department of Highways and Public Transportation*, 107 S. Ct. at 2958 (J. Brennan, dissenting).

Pennsylvania seeks to augment state immunity and undermine Congressional power through its contention that Congress may *only* abrogate state immunity when acting pursuant to the Fourteenth and later Amendments to the Constitution. This proposition has never been accepted by this Court, *Welch v. State Department of Highways and Public Transportation*, 107 S. Ct. 2941, 2946 (1987), *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252 (1985), and has been expressly rejected by five courts of appeals. *Union Gas II*, Pet. App. 64-65a; *In re McVey Trucking*, 812 F.2d 311, 328 (7th Cir. 1987) cert. denied 108 S.Ct. 227 (1987); *County of Monroe v. Florida*, 678 F.2d 1124, 1128-35 (2d Cir. 1982) cert. denied, 459 U.S. 1104 (1983); *Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1074-82 (5th Cir. 1979); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979).

Indeed, no court has ever accepted Pennsylvania's proposition for very fundamental reasons. Pennsylvania would have this Court interpret the Constitution on a "time-line". See *Union Gas II*, Pet. App. at 40a. Thus, in Pennsylvania's view, the Fourteenth Amendment is a watershed, and Congress may only abrogate state immunity as to enactments which draw their constitutional authority from the Fourteenth and later Amendments, not from the preceding text of the Constitution. Not only does this proposition violate this Court's admonition that the Constitution must be interpreted as a single instrument, all of whose parts are equal, *Prout v. Starr*, 188 U.S. 537, 543 (1903), but it would measurably diminish Congress' power to protect citizens through the exercise of its Article I powers.

Surely the Eleventh Amendment, which by its own language restricts the judiciary, not Congress, was never intended to limit Congress' Article I powers. Article I, Section 8, of the Constitution, by far the most frequent source of power for congressional enactments, has an effectuating clause similar to that of the Fourteenth Amendment. Clause 18 of Section 8 empowers Congress:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

By comparison section 5 of the Fourteenth Amendment declares:

> Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

In both clauses the states ceded to Congress the authority to carry out its enumerated powers, including the abrogation of state immunity. The Eleventh Amendment simply does not, and was not intended to, limit the enabling clause of Article I.

As the court of appeals pointed out, the Constitution itself provides a system of checks and balances so that Congress does not exercise Eleventh Amendment abrogation recklessly. *Union Gas II*, Pet. App. 56a. Congress consists of senators and representatives elected in each state. It is they who determine, in unmistakable language, which federal statutory schemes are so important as to require that states participate and be liable in private party actions. Should Congress perceive that the burden on states of being subjected to suit in federal court has become too onerous, Congress can amend the law to create state immunity from suit.

III
RETROACTIVE LIABILITY UNDER CERCLA DOES NOT PRESENT AN ELEVENTH AMENDMENT ISSUE

CERCLA's retroactive liability does not implicate Eleventh Amendment concerns. Since Congress has the power to abrogate Eleventh Amendment sovereign immunity, it matters not whether Congress utilizes that power in a statute with a prospective or retrospective scope. Issues of the constitutionality of abrogation under the Eleventh Amendment and the constitutionality of retroactive liability under the Fifth Amendment's due process clause are distinct. CERCLA's imposition of retroactive liability has been held to be constitutional under the Fifth Amendment, see, e.g., *U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 732-34 (8th Cir. 1986) and

cases cited therein, and Pennsylvania does not contend to the contrary. Therefore, Congress' abrogation of state immunity as to an otherwise constitutional enactment cannot be unconstitutional, and the court of appeals properly followed this Court's precedents in applying the law in effect at the time the appeal was decided. *Union Gas II*, Pet. App. 67-72a; *Andrus v. Charlestone Store Products Co.*, 436 U.S. 604, 607-08, n. 6 (1978); *Thorpe v. Housing Authority*, 393 U.S. 268, 281-82 (1969); *U.S. v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

CONCLUSION

For all the foregoing reasons, respondent respectfully urges this Court to deny Pennsylvania's petition for writ of certiorari.

Respectfully submitted,

Robert A. Swift
(Counsel of Record)
KOHN, SAVETT, KLEIN & GRAF, P.C.
2400 One Reading Center
1101 Market Street
Philadelphia, PA 19107
(215) 238-1700

Lawrence Demase
ROSE, SCHMIDT, CHAPMAN,
DUFF & HASLEY
900 Oliver Building
Pittsburgh, PA 15222
(412) 434-8610